

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of ELSA and
NHIEH H. CHAU.

ELSA CHAU,

Respondent,

v.

NHIEH H. CHAU,

Appellant.

B287074

(Los Angeles County
Super. Ct. No. BD558797)

APPEAL from an order of the Superior Court of Los Angeles County. Rolf M. Treu, Judge. Affirmed.

Nhien H. Chau, in pro. per., for Appellant.

Elsa Chau, in pro. per., for Respondent.

* * * * *

This is the second time this case has come before us. In his first appeal, husband Nhien H. Chau appealed the trial court's denial of his motion to set aside the marital settlement agreement with wife Elsa Chau, and the corresponding judgment. (*In re Marriage of Chau* (Oct. 4, 2016, B265261) [nonpub. opn.] (*Chau I*.) Husband's motion was based on "extrinsic fraud" due to wife's alleged misrepresentations and concealment of assets during settlement negotiations. We reversed, finding the trial court had applied the wrong legal standard, and remanded with instructions that the trial court determine whether to consider the motion under either Family Code section 2122 or its inherent equitable powers, both of which provide relief on the basis of fraud. (*Chau I, supra*, B265261.)

Following remand, the trial court set the matter for reconsideration of husband's motion. The parties filed new declarations, based on substantially the same facts and theories advanced in husband's previous motion. The court concluded that husband had filed a new motion, and that it was untimely under Family Code section 2122. The court also found that husband had not demonstrated his entitlement to equitable relief.

For the reasons set forth below, we affirm.

BACKGROUND

The following facts are taken from our earlier opinion: husband and wife married in 1988. In February 2012, wife filed a petition for dissolution of marriage. In October 2013, the parties entered into a settlement agreement, providing for the division of assets upon dissolution, and each waived their right to receive spousal support. In April 2014, wife filed a motion for entry of judgment based on the settlement agreement under Code

of Civil Procedure section 664.6. Husband opposed the motion, arguing that his attorney did not allow him to meaningfully participate in the negotiations, his attorney advised he was not entitled to spousal support, so he “must” waive it, and he was not allowed to read the agreement before signing it. The motion was heard in July 2014. The court granted the motion, but judgment was not entered until April 2015. The judgment awarded wife a residence in Norwalk, among other assets, and awarded husband a Gardena property, among other assets. Husband was to make an equalization payment of \$120,000 to wife. (*Chau I, supra*, B265261.)

On May 8, 2015, husband filed a request for an order (or RFO), asking the court to set aside the settlement agreement and order granting the motion for entry of judgment because they were “obtained due to [wife’s] fraud.” The memorandum sought to “set aside [the] marital settlement agreement[] based on considerations of equity.”

Husband contended that wife had concealed the existence of two community vehicles, and failed to disclose rental income she was receiving from the Norwalk property after their separation, she mischaracterized “her separate property interest in the community Gardena property” and “misrepresented the community interest in [wife’s] 401K.”

Wife filed a responsive declaration denying most of the allegations of fraud.

The trial court denied husband’s “request for an order to set aside pursuant to Code of Civil Procedure section 473,” without further explanation of its ruling.

Husband timely appealed, and we reversed, finding the trial court abused its discretion when it denied husband’s motion

pursuant to Code of Civil Procedure section 473 because “husband did not seek relief under this section. Instead, husband sought relief on the basis of *fraud*, and Family Code sections 2121 and 2122 permit a court to set aside a judgment based on fraud.” (*Chau I, supra*, B265261.) We concluded the request for an order should be reconsidered under the bases stated in the supporting memorandum, Family Code section 2122 or the court’s inherent equitable powers. (*Chau I, supra*, B265261.)

On remand, the court set a hearing for reconsideration of husband’s 2015 request for an order “under Family Code Section 2122 . . . or the court’s inherent equitable powers.” The court authorized the parties to file supplemental declarations.

The case was reassigned to a different judge, and the reconsideration hearing was continued a number of times.

On September 5, 2017, husband filed a new memorandum of points and authorities, a new declaration, and exhibits asserting substantially the same points as those made in support of husband’s 2015 request for an order.

Like his 2015 request for an order, husband’s new declaration set forth various misrepresentations by wife concerning the parties’ marital assets. He claimed wife misrepresented that she made a separate property contribution to purchase the parties’ Gardena home, when in fact only husband contributed the down payment. Wife also represented that a \$25,000 loan from her 401K account was used to purchase a home in Norwalk, but in fact, only \$6,000 from this loan was used to finance the purchase. Moreover, wife concealed that the property was purchased for her and her sister, even though wife used community funds to buy it. Wife also failed to disclose rents she received from the Norwalk property from her family members

who lived there; did not disclose two vehicles she bought during marriage with marital funds; paid the parties' appraiser additional funds to receive a more favorable appraisal of the parties' properties; and failed to disclose her attorney had a lien on wife's portion of the marital settlement for payment of his fees.

The exhibits attached to husband's declaration, however, belied his claims, or completely failed to support them. For example, escrow documents for the Gardena property which predated the marital settlement showed the down payment came from both husband and wife; wife's 2012 discovery responses accurately disclosed that only a portion of the 401K loan was used to fund the purchase of the Norwalk home, and that she shared the home with her sister. To support his claim that the property appraisals favored wife, husband included an appraisal of the Norwalk property *obtained years after the settlement and judgment*.

Wife filed a responsive declaration on October 12, 2017. However, wife's declaration has not been included in the clerk's transcript, as husband failed to accurately designate it in his notice designating the record on appeal.

Husband filed a responsive declaration, apparently responding to wife's evidence. Husband admitted he knew about the two vehicles when he entered the marital settlement agreement.

The trial court held the reconsideration hearing on October 25, 2017. The court found husband's 2017 filings constituted "a new RFO and not the same RFO which was the subject of the appeal," and that husband was not seeking reconsideration of his 2015 motion. The court concluded the

motion was untimely under Family Code section 2122, subdivisions (a) and (e), as it was filed more than a year after the fraud was discovered, and more than a year after the judgment was entered.

The court also found husband's request for equitable relief based on extrinsic fraud or mistake failed on the merits. The court concluded that any fraud or mistake was either not supported by the evidence, contradicted by wife's evidence, or necessarily intrinsic because the facts were readily discernable from documents predating the settlement.

Husband timely appealed.

DISCUSSION

Husband contends the trial court abused its discretion by finding his motion was untimely under Family Code section 2122, subdivisions (a) and (e).¹ He argues the "relation-back doctrine," applicable to amended pleadings, applies to his 2017 motion, as the new filings arose from the same facts and circumstances as

¹ Family Code section 2122 provides, in pertinent part: "The grounds and time limits for a motion to set aside a judgment, or any part or parts thereof, are governed by this section and shall be one of the following: [¶] (a) Actual fraud where the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding. An action or motion based on fraud shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the fraud. . . . [¶] . . . [¶] (e) As to stipulated or uncontested judgments or that part of a judgment stipulated to by the parties, mistake, either mutual or unilateral, whether mistake of law or mistake of fact. An action or motion based on mistake shall be brought within one year after the date of entry of judgment."

his 2015 motion. He also argues the trial court erred in concluding that he had not demonstrated “extrinsic fraud.”

Even assuming, without deciding, the trial court erred, husband has failed to demonstrate prejudice. To establish prejudice, an appellant must demonstrate that but for the trial court’s error, he would have received a more favorable outcome in the proceedings below. (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.)

Here, the record is inadequate to demonstrate prejudice as to the trial court’s finding that husband did not demonstrate extrinsic fraud, because wife’s responsive declaration was omitted from the appellate record. “[I]t is settled that: ‘A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.’ ” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) It is the appellant’s burden on appeal to produce a record “‘which overcomes the presumption of validity favoring [the] judgment.’ ” (*Webman v. Little Co. of Mary Hospital* (1995) 39 Cal.App.4th 592, 595.) “ ‘Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant].’ ” (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 188.) Without wife’s responsive declaration, we cannot know what arguments, or evidence, were advanced to demonstrate there was no extrinsic fraud, making it impossible to assess prejudice. This is especially true because the trial court expressly found, in several instances, that wife’s opposition evidence contradicted husband’s claims of fraud.

Moreover, on the record we do have, we are not persuaded the outcome would have been different had the court considered the motion under Family Code section 2122. The court found that husband failed to demonstrate extrinsic fraud or mistake because either wife did not make any misrepresentations, or husband had full access to the information he claimed to have been misled about. Husband sought to set aside the judgment under the fraud and mistake provisions of section 2122 cited in footnote 1, *ante*. Irrespective of any extrinsic or intrinsic fraud distinction, the court's underlying explanations for rejecting each claim were equally fatal to husband's section 2122 arguments.

DISPOSITION

The order is affirmed. Wife is to recover her costs on appeal.

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J.

ADAMS, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.